Supreme Court, U.S.
FILED
DEC 19 1996
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No. 96-807

In The

Supreme Court of the United States

October Term, 1996

TERRY P. PLESCHER,

Petitioner,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the PALM BEACH COUNTY SHERIFF'S OFFICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

In their Brief in Opposition, Respondents, RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the Palm Beach County Sheriff's Office, (hereinafter "Defendants") cites to the transcript of trial as follows: T. (Volume)-(Page #).

Additionally, throughout their Brief in Opposition, Defendants refer to the Petitioner, TERRY PLESCHER, as either "Plaintiff" or "PLESCHER" and cites to the Petition for Writ of Certiorari as follows: P. (Page).

STATEMENT OF THE CASE AND FACTS

i) Course of Proceedings and Disposition in the Courts.

The Plaintiff originally sued Defendants for alleged violations of Plaintiff's constitutional rights, and for state law claims of assault, battery and negligence.

Defendants removed the action to the United States District Court for the Southern District of Florida. (R. 1).

On September 16, 1994, the Plaintiff's Motion for Leave to Amend the original Complaint was granted. (R. 90). The Plaintiff filed the Amended Complaint on October 20, 1994. (R. 93).

The Plaintiff, who knew full well the Defendants were represented by counsel, as the case had been in litigation for well over a year, hand delivered a Motion for Default to the Clerk of the Court as to all Defendants on November 18, 1994, stating that Defendants failed to

file any papers as required by law (R. 98). Defendants immediately filed a response to the Notice for Default and their Answer and Affirmative Defenses on November 21, 1994, to the Amended Complaint (R. 99, R. 100). The Clerk of Court denied the Plaintiff's Motion for Default on November 24, 1994, knowing that Defendants had filed their Answer on November 21, 1994. (R. 102).

On February 27, 1995, the District Court set the matter for trial at a special trial setting. (R. 121). Trial was to commence March 6, 1995 (R. 121). On March 2, 1995, Plaintiff filed a Motion for Entry of Judgment, and to limit Presentation of Evidence to Issues of Compensatory and Punitive Damages. (R. 122).

The parties tried this action before the Honorable Kenneth Ryskamp, United States District Court Judge, Southern District of Florida, and a jury, from March 6, 1995 through March 14, 1995. At the close of the Plaintiff's case in chief, a Motion for Directed Verdict was made on behalf of Defendant GRANT. The Court granted this Motion as to Defendant GRANT. (Tr. 704). On March 14, 1995, the jury returned a verdict for the Defendants. (Tr. 931).

Plaintiff appealed to United States Court of Appeals for the Eleventh Circuit. In a one sentence, PER CURIAM opinion, Eleventh Circuit affirmed, citing to Eleventh Cir. R. 36-1.[1]

Prior to Trial, Plaintiff filed a number of Motions in Limine, one relating to the evidence of the Plaintiff's blood alcohol content, (R. 138) and one restricting the introduction of Workers' Compensation benefits received

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[1] The Court of Appeals Per Curiam opinion is reprinted by Petitioner at Appendix, A-1 of the Petition.

by Plaintiff, alleging that Workers' Compensation benefits were a collateral source (R. 118).

The Court properly denied the Plaintiff's Motion in Limine to exclude evidence of the Plaintiff's blood alcohol content because it is extremely relevant in regards to the Plaintiff's conduct, and Plaintiff's counsel agreed on that issue, stating that "on that issue the degree of Plaintiff's intoxication may be relevant because it may show something about his conduct". (Tr. 17). The District Court denied Plaintiff's Motion in Limine to bar blood alcohol evidence (Tr. 17).

The second motion asked the District Court to bar the introduction of Workers' Compensation evidence, alleging that it was a collateral source. (R. 118). The Court agreed at that point, that while the fact that the previous injury may come in, benefits received from Workers' Compensation should be excluded. (Tr. 20).

ii) Statement of the Facts.

The case tried at the District Court level was a very simple one. Plaintiff claims that Defendants intentionally broke his leg in half on a parking bumper. The Defendants denied that this occurred and the eight person jury concurred with this finding. (Tr. 931). It is also the recounting of the events in the night in question that makes the evidence of the Plaintiff's blood alcohol level so critical.

On the evening of July 20, 1990, Defendant MATTINO, was working a zone in which the Plaintiff resided. He received a call on his radio to respond to a battery and shooting. (Tr. 120-121). Because this was a "shots fired" called, Defendant GRANT, the Sergeant on duty,

responded to the home of the Plaintiff because he was in charge of shift. (Tr. 136).

Defendant GARFIELD, who was voluntarily dismissed from the case by Plaintiff after he testified (Tr. 147) witnessed Plaintiff screaming and hollering from the inside of his residence, whistling, ranting and raving. Plaintiff was upset with channel 5, "as well as all kinds of off the wall stuff" (Tr. 137). Defendant GRANT approached Plaintiff, telling him to put his hands where he could see them. Plaintiff's response to Defendant GRANT's orders, a uniformed deputy, was to "get the fuck out of my yard. You've got no business here". (Tr. 139).

As a result of the Plaintiff's failure to comply with uniformed Deputy Sheriffs' orders, Defendant GARFIELD grabbed the arms of the Plaintiff and because of the Plaintiff's resistance, Defendant MATTINO and Defendant GRANT assisted in bringing Plaintiff to the ground in order to handcuff him. Even while lying on the ground, Plaintiff continued to disobey direct commands from the Deputy Sheriffs. Eventually, the Defendants were able to get control of the Plaintiff and handcuff him. (Tr. 140-141).

Defendants learned from Plaintiff's wife that Plaintiff had recently had back surgery. A transport van, operated by Defendant HIMMELSBACH, was called to the scene (Tr. 126). Plaintiff was placed in the rear of the van and taken to Humana Hospital for medical clearance (Tr. 207).

The emergency room physician stated that the Plaintiff was quite hostile, violent and a threatening patient. (Tr. 513). In fact, upon direct questioning by Plaintiff's counsel, Dr. Lamelas, the emergency room physician, told

Plaintiff's counsel that his client appeared to be quite intoxicated and hostile. (Tr. 512).

It was after this examination was concluded by Dr. Lamelas that Plaintiff attempted to strike Mr. Santiago, an emergency room technician, and tried to run out of the emergency room, down a hallway. This resulted in Mr. Santiago pursuing, tackling and recapturing the Plaintiff and escorting him out to the Palm Beach County Sheriff's Office van (Tr. 519-520).

Defendant HIMMELSBACH left Humana Hospital with the Plaintiff in the back of his van. The computer system of the hospital occasionally shuts down at that late hour, causing problems in the time at the top of chart, thus resulting in approximate discharge times at the bottom of the medical charts for arrival and departure times from the hospital of the Plaintiff. (Tr. 581).

According to Dr. Lamelas, he was of the opinion that Plaintiff was in leg restraints upon his initial departure from Humana Hospital. Mr. Santiago testified that the Plaintiff was handcuffed only, with no leg restraints. (Tr. 497). Plaintiff himself does not even recall if he was in leg restraints or not upon his initial departure from Humana Hospital (Tr. 825).

iii) Defendants' Version of Events Subsequent to Departing Humana Hospital on The First Occasion and Returning to Humana Hospital

A vast disparity exists as to the sequence of events that occurred subsequent to Plaintiff departing Humana Hospital in the transport van.

While in route to the Palm Beach County Jail from Humana Hospital, Defendant MATTINO received a call from Defendant HIMMELSBACH stating that the Plaintiff

was kicking out the back of the van door (Tr. 166). The Plaintiff was kicking the van door, kicking the sides and cussing and raving from the time of the departure from Humana Hospital until he began to enter the roadway at interstate I-95. This was what prompted Defendant HIMMELSBACH to radio Defendant MATTINO and state to Defendant MATTINO, that "this man is kicking out the van doors". (Tr. 219).

Upon arrival, Defendant HIMMELSBACH showed Defendant MATTINO the damage to the van. (Tr. 172). Defendant MATTINO approached the van door in order to take the Plaintiff out of the van and apply leg restraints in order to keep the Plaintiff from kicking the van door any further. (Tr. 172).

Upon opening the van door, Defendant MATTINO asked Plaintiff to come out of the van, to which he refused. Plaintiff then attempted to kick Defendant MATTINO. Eventually, even though Plaintiff was twisting and kicking, Defendant MATTINO was able to get Plaintiff out of the van which resulted in the Plaintiff and Defendants falling to the ground. It was at this point in time that Defendant MATTINO was able to place leg restraints upon the Plaintiff (Tr. 179). Defendant MATTINO said that the Plaintiff did not have a broken leg at the time he placed the leg restraints on Plaintiff (Tr. 180). Also, Defendant HIMMELSBACH said that Plaintiff did not have any injuries after having been restrained and being placed back in the van (Tr. 263). Defendant MATTINO did notice a cut on Plaintiff's face which was bleeding. This is the sole reason why a decision was made to return Plaintiff back to Humana Hospital for medical clearance (Tr. 181-182). Eventually Defendant GRANT arrived at the scene. Defendant MATTINO had called Defendant

GRANT to come to the scene because of injuries sustained to the Plaintiff's forehead (Tr. 183). Upon arriving at the scene, Defendant MATTINO advised Defendant GRANT of the damage to the vehicle and that Plaintiff had to be taken back to Humana Hospital for medical treatment as a result of the cut to Plaintiff's head. Upon arrival and the scene, Plaintiff was already back inside the van. Defendant GRANT did not see the Plaintiff, but did notice the damage to the van. Defendant GRANT also did not know that the Plaintiff had a broken leg at the time. (Tr. 609).

Upon arriving back at Humana Hospital, the Plaintiff does not tell the attending medical providers that any of the Deputy Sheriffs placed his leg on a parking bumper and jumped on it and broke it in half. (Tr. 584). Once again, emergency room technical Santiago becomes involved in the instant matter, and observes the structural damage done to the transport van (Tr. 499). It is also emergency room technician Santiago who notices that Plaintiff's leg was broken.

The Defendants' causation expert, Dr. Craig Lichtblau, opined that the injury Plaintiff sustained was a rotational torque type injury. Dr. Lichtblau's opinion was that the Plaintiff broke his leg during the altercation with the Defendants on I-95, but the fracture became displaced as Plaintiff continued to thrash around in the back of the transport van (Tr. 759-762).

iv) Plaintiff's Version of Events Subsequent to Departing Humana Hospital on the First Occasion and Returning to Humana Hospital

Plaintiff's entire case hinged on the testimony of the Plaintiff, who in essence alleges he was taken to a clandestine area, his leg was put over a parking bumper and his leg was broken in half by two members of the Palm Beach County Sheriff's Office. (Tr. 686-687). The inebriated state of the Plaintiff is critical as to the facts and circumstances leading up to the injury sustained by the Plaintiff.

Plaintiff testified at trial that he was restrained with leg restraints when he first departed Humana Hospital. (Tr. 683). Yet, in his deposition, he didn't recall whether or not he had leg restraints on. (Tr. 825).

Plaintiff testified that after being placed in the transport van, the van made several turns, ran over some bumps, made a U-turn and stopped. (Tr. 685). Of course, it was not until one week before the trial that Plaintiff was able to "rediscover" the clandestine area (Tr. 846). Plaintiff testified that the drive from the hospital to this area took only a few minutes time. (Tr. 689). It was ironic the precision to which Plaintiff testified some three years after the incident as to "where he was driven".

In referring to Defendants HIMMELSBACH and MATTINO, Plaintiff testified that they just grabbed him by his ankles, spun him around, carried him over to an area where there was some parking bumpers, some trees, and a chain link fence, and put his leg over a parking bumper and jumped on it. (Tr. 687-689)

It was after this incident occurred that Plaintiff testified that Defendant GRANT arrived at the scene and

yelled "what the hell is going on here" to Defendants HIMMELSBACH and MATTINO. (Tr. 689).

According to Plaintiff, after this elaborate scheme was complete, Defendants returned to Humana Hospital, where the Plaintiff had just departed without a broken leg, where he is again treated by the exact same hospital personnel as on his previous visit.

Eventually, Plaintiff pled to the charge of battery upon Defendant HIMMELSBACH; to battery upon Defendant MATTINO; battery upon a minor; firing and discharging a firearm within city limits; and vandalism and destruction of both county and private property. Plaintiff also pled and paid back TWO HUNDRED DOLLARS ($200.00) of restitution to the Palm Beach County Sheriff's Office for damage that was done to the transport van of the Palm Beach County Sheriff's Department. (Tr. 806-813).

CORRECTION OF MISSTATEMENTS IN PETITION

Rule 15.1, Supreme Court Rules, compels Defendants to address misstatements of fact or law contained in a Petition. The instant Petition contains both patent misrepresentations and misleading omissions. Respondents statement of the case and facts, supra, corrects the misstatements; however, Respondent specifically identifies each misstatement/misrepresentation below.

The Plaintiff is incorrect in asserting that the District Court abused its discretion by vacating the entry of default against the Defendants. The Clerk of Court never entered a default against the Defendants, and moreover denied Plaintiff's Motion for Default. (R. 102).

The sole basis for Plaintiff's issue regarding the default is that Plaintiff argued that Defendants were in

default and did not take action to vacate default. This statement is patently false. The Defendants filed a response to the Appellants Motion for Default along with their Answer on November 21, 1994, which clearly and obviously constitutes action towards vacating the alleged "default" even though no default had been entered. (R. 99-100).

Furthermore, the Plaintiff took numerous affirmative steps on the issue of liability well after the alleged default had been entered. Had the Plaintiff truly believed the default was entered, the Plaintiff certainly would not have filed these Motions, nor waited until four days before trial to file a Motion on limiting evidence to damages only.

The Plaintiff misled the Trial Court by stating that "Defendants are in default right now". (Tr. 4). Based upon the Plaintiff's misrepresentation, the District Court then quickly examined the docket entry number 102 (R. 102), and misconstrued it as an entry of default.

Docket entry number 102 may be somewhat ambiguous on its face because there is a provision that states that the Defendants are not default (sic) and then one states that default is entered. The Defendants never admitted that they did not take any action to vacate the default. This is clear by the filing of Defendants' Response to Plaintiff's Notice for Default that was filed on the day the Motion for Default was received by Defendants when it had been hand delivered by Plaintiff's Counsel to the Clerk of Courts.

Despite Petitioner's suggestion to the contrary, there was no agreement by the Defendants not to introduce the Workers' Compensation benefits. Simply put, the Plaintiff was suing Defendants, alleging that members of the Palm

Beach County Sheriff's Office violated his civil rights by intentionally putting his leg on a parking curb, jumping on it, and breaking the lower right extremity of the Plaintiff. At no time was the Palm Beach County Sheriff's Office "reimbursing" Plaintiff for any of the injuries he sustained to his back as result of an on the job accident. When Plaintiff injured his back in January of 1990, his employer voluntarily accepted his injury as a work related injury. They have never contested the fact that it was work related and he has been receiving Workers' Compensation benefits from that point in time. (Tr. 844). In fact, upon questioning by his own lawyer, Plaintiff stated that "but for his leg injury he would have gone on with his life the best he could, no big deal". (Tr. 854).

The Plaintiff was receiving Workers' Compensation benefits as a result of an entirely separate incident and it was for this work related back injury that the Plaintiff was receiving Workers' Compensation benefits.

Whether or not evidence was introduced regarding payments to Plaintiff as a result of the back injury sustained on the job are not collateral sources, and this issue is not addressed in any of the cases cited in Petitioner's Brief.

Most importantly, during the trial, Dr. Bernard Pettingill, an economist retained by the Plaintiff, testified to the economic losses allegedly sustained by Plaintiff. That report states that on July 29, 1990, Plaintiff, a white male, was involved in an accident resulting in a "permanent and partial disability".

The sole reason that the amount of Workers' Compensation that the Plaintiff was earning was offered into evidence was as a result of the Plaintiff's attempt to commit a fraud upon the jury and have their expert

economist tell the jury that the Plaintiff had a future economic loss of hundreds of thousands of dollars ***solely*** as a result of his leg injury, without telling the jurors that the Appellant was receiving approximately $1,700 a month in Workers' Compensation benefits for his unrelated back injury. This is the only reason why the amount of money that Plaintiff was receiving per month had to be introduced into evidence during the trial. (Tr. 413-414).

Dr. Pettingill was asked by Plaintiff to come and testify as to past earning capacity losses, past medical expense losses, and future economic losses as a result of the Plaintiff's inability to work, with the inappropriate assumption that all of the Plaintiff's damages were as a result of his leg injury. Further, Dr. Pettingill was under the assumption that all of these monies were due and owing to the Plaintiff because he injured his leg and as a result of that was permanently disabled. (Tr. 411-412).

As such, due to the Plaintiff's attempt at deception upon the ladies and gentlemen of the jury, as well as willfully inaccurate and misleading data being provided to their experts prior to the expert's testimony, Defendants were left with no choice but to have Workers' Compensation evidence offered at the trial level.

Clearly it would have been a fraud upon the jury to have Dr. Pettingill testify to the future economic losses of hundreds of thousands of dollars when the reason Plaintiff was not working was not as a result of his leg injury, but as a result of a solely independent injury to his back separate and apart from this cause of action.

Plaintiff has not, because Plaintiff cannot, cite to one single case that precludes the introduction of Workers' Compensation benefits associated with one injury while

the Appellant is suing another tort feasor for a wholly separate injury, because none exists.

In the instant case, the Plaintiff, through his vocational expert, Mr. Feinstein and his economist, Dr. Pettingill, opened the door to the introduction of Workers' Compensation benefits paid to the Plaintiff. Plaintiff presented evidence through these experts that the Appellant was totally disabled and unable to work as a result of his leg injury. This information was false, and the jury clearly needed to know the truth of the prior disability and the compensation associated with that injury.

ARGUMENT

I. The Eleventh Circuit's Affirmance Of The District Court's Decision Regarding The Issue Of Default Is Not In Conflict With Any Other Jurisdiction. The Plaintiff Is Incorrect In Asserting That The District Court Abused Its Discretion By Vacating The Entry Of A Default Against The Defendants.

Assuming arguendo that the District Court Judge believed that the Clerk of Court entered a default against the Defendants, it would not have been an abusive discretion by the District Court to vacate the entry of default because Defendants met their burden in overcoming the default and the District Court believed Plaintiff neglected to follow up on that default. Deference should be given to the Court for their discretionary decision in vacating the entry of default. Whether or not to enter a default is within the sound discretion of the Court. The law does not favor defaults, and any doubts as to whether a party is in default should be cited in favor of the defaulting party. *Marschauser v. Traveler's Indemnity Co.*, 145 F.R.D. 605, (S.D. Fla. 1992), *Lee v. Brotherhood of Maintenance of*

Way Employees, 139 F.R.D. 376 (D. Minn. 1991). The Plaintiff contends that Defendants were in default and did not take action to vacate the default. As discussed above, this is a falsity since the Defendants filed a response to Appellants Motion for Default along with their Answer on November 21, 1994, which would clearly constitute action towards vacating any alleged default, even though no default had been entered. (R. 99), (R. 100).

What is most ironic is that despite the alleged default, the Plaintiff was involved in numerous activities and affirmative steps at the time of trial on the sole issue of liability by filing numerous motions, all filed after the alleged "Notice of Default" filed by the Clerk of Court on November 25, 1994 (R. 102). The pleadings filed by Plaintiff included a Motion for Special Trial Setting; (R. 103) Submitting Exhibit List and Supplements; (R. 104) (R. 105) Fifth Supplemental Response to Defendants' Request for Production; (R. 106) renewed a Motion for Special Trial Setting; (R. 107) Motion for Judicial Notice of Newspaper Articles; (R. 110) Notice of Plaintiff's Intention to Use Summaries Pursuant to Federal Rule Evidence; (R. 112) Notice of Filing Update to Standards for Law Enforcement Agencies; (R. 113) Notice for Judicial Notice; (R. 114) Notice to Produce at Trial; (R. 116) Motion in Limine to Exclude Prior Bad Acts; (R. 117) Motion in Limine to Exclude Evidence of Benefits Received From Collateral Source; (R. 118) Motion in Limine to Preclude the Introduction of Photographs; (R. 119) Motion in Limine to Exclude Evidence That Plaintiff May Recover Attorney's Fees. (R. 120). Had the Plaintiff truly believed that a default was entered, the Plaintiff surely would not have filed these motions nor waited until four days

before trial to file a Motion on Limiting Evidence to Damages Only.

Docket entry number 102 may be somewhat ambiguous on its face because there is a provision that states the Appellees are not default (sic), and then one that states that default is entered. Assuming that the Plaintiff was unsure as to what this document actually meant, he should have investigated the ambiguity, which would have revealed that this was in fact a denial of the Plaintiff's Motion for Default. The District Court appropriately remedied this situation by assuming that the Clerk had entered a default against the Defendants, and vacated the default based upon the Plaintiff's own remission in not seeking a default judgment after obtaining the default. (Tr. 5).

The proper procedure for obtaining a default judgment is articulated in Federal Rule of Civil Procedure 55, none of which was complied with by Plaintiff. It is a two step process that must be followed. First the movant must ask the Clerk for entry of a default, then the movent must ask either the Clerk or the Court for a Judgment by Default. The Clerk's entry of a party's default is merely the official recognition that a party is in default. The entry of a default is a prerequisite for the entry of Judgment upon that default. *Lee v. Brotherhood of Maintenance of Way Employees*, 139 F.R.D. 376 (D. Minn. 1991).

Assuming Plaintiff believed a default was entered, the District Court was correct in ascertaining that the Plaintiff was remiss in not asking for the second step, a hearing on damages only. (Tr. 5). The alleged default was supposedly on November 25, 1994, the Plaintiff took no action until four days before trial (March 25, 1995), when they filed a motion to limit presentation of evidence to

issues of compensatory and punitive damages. (R. 122). Upon receiving this motion, the Defendants responded on the first day of trial, March 6, 1995, that the Plaintiff's motion was inconsequential because the Plaintiff never completed step one of the process, obtaining an entry of default by the Clerk. (Tr. 2-5).

Because the Trial Judge is the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties, a reviewing Court will defer to his decision unless it is clearly wrong. *Marziliano v. Heckler*, 728 F. 2d 151 (2d Cir. N.Y. 1984).

Disposition of motions to set aside an entry of default, or a default judgment, lies largely within the discretion of the Trial Judge whose action is not likely to be disturbed by an Appellate Court. *Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Co.*, 383 F. 2d 249 (4th Cir. VA 1960). Plaintiff has cited a plethora of cases in his Petition laying out the standard for setting aside a Default Judgment and arguing Defendants have not met the standard. Their efforts, however, are futile, because supposing that an entry of default was entered, the Defendants would have only to have met the lesser standard of good cause under *Federal Rule of Civil Procedure* 55, and not the higher standard of *Florida Rule of Civil Procedure* 60.

First and foremost, when the Defendants filed their response to Plaintiff's Notice for Default, it was physically impossible to file it any sooner than on the day that they received the Notice for Default the Plaintiff had conveniently hand delivered to the Clerk for the Southern District, despite knowing that defense counsel was assigned and representing all the named Defendants.

This Motion clearly enumerated that the undersigned received the Plaintiff's Notice for Default on November 21, 1994, the Motion indicated that the case had been going on in litigation since August of 1993, and has included voluminous amounts of discovery.

On September 14, 1994, the Court issued an Order allowing the Plaintiff to file an Amended Complaint, which had made the response to the Amended Complaint due, within the prescribed time period, on October 4, 1994. The Complaint was originally answered by the undersigned, and in fact, Motions to Dismiss had been filed by the undersigned. Had the Plaintiff's counsel contacted the undersigned, certainly an Answer could have been filed as soon as it was brought to the counsel's attention. Clearly, as was evidenced by the pleadings in the underlying case, and the result at trial, the Defendants have a meritorious defense, and denying the Plaintiff's Motion for Default did not result in prejudice to the Plaintiff.

Any reasonable doubt regarding the vacation of a default should be resolved in favor of granting the application and allowing the case to proceed to trial on its merits. Federal Courts have held that in order to establish a mistake, inadvertence, or excusable neglect, the defaulting party must show that: (1) it had a meritorious defence that might have affected the outcome; (2), that granting of the motion would not result in prejudice to the non defaulting party; (3) and a reason existed for failing to reply to the Complaint. *Florida Physicians Insurance v. David Ehlers*, 8 F. 3d 780, (11th Cir. Fla. 1993). With respect to the third element, "technical error or a slight mistake, by a party's attorney should not deprive the party of an opportunity to present the merits of his claim". Clearly,

the filing of this Answer to the Amended Complaint, which was brought to the attention of the undersigned by way of the Plaintiff's Notice of Default, demonstrates the due diligence of the undersigned.

Quite to the contrary alleged by Plaintiff, there was no delay in filing to this Motion of Default of three months, it was more like three minutes before appropriate responses and answers were filed with the Court.

Although addressed in their original Brief to the Eleventh Circuit, and conspicuously dropped in this Writ of Certiorari, Plaintiff claimed that the Court's reasoning for vacating default because an Answer stands over to an Amended Complaint was improper, arguing lacking of cases of supports this proposition. However, in *Martschinske v. Olympic Styles, Inc.*, 628 F. Supp. 231, aff'd 774 F. 2d 1172 (8th Cir. S.D. 1985), the Court permitted Defendants to refile an original Answer as their response to an Amended Complaint when the only change was to alter the prayer for relief from breach of contract to recision. Also, in *ABI Inv. Group v. FDIC*, 860 F. Supp. 911 (D. N.H., 1994), an entry of default was not warranted when Defendant failed to timely file response to the Amended Complaint, where the Amended Complaint and the original Complaint contained identical claims, such as the exact same case in the instant case.

The District Court's decision to vacate the entry of the file was not an abuse of discretion. The District Court's decision does not conflict with any other Circuits, and as such, the Petitioner's request for review should be denied based on Petitioner's first argument.

II. The Admission Of Collateral Source Benefits Does Not Warrant Review By This Court And Does Not Violate Previous Court Rulings.

The Plaintiff cites dozens of cases that in one way or another allude to the fact that the introduction of collateral evidence, whether it be disability payments or workers' compensation benefits, is improper and prejudicial because it may adversely affect the jury's deliberations, or violate the collateral source rule.

The extensive litany of cases cited by the Plaintiff and corresponding analysis fails to understand the critical difference between the instant lawsuit and the collateral source rule. Simply put, Plaintiff was suing Defendants, alleging that members of the Palm Beach County Sheriff's Office violated his civil rights by intentionally putting his leg on a parking curb, jumping on it, and breaking it. At no time was the Palm Beach County Sheriff's Office reimbursing Plaintiff for any of his injuries sustained to his back. The Plaintiff injured his back in January 1990. His employer voluntarily accepted his injury as a work-related injury. They have never contested the fact that it was a work-related injury, and the Plaintiff has been receiving workers' compensation benefits from that point in time (Tr. 844).

The Plaintiff was receiving workers' compensation benefits as a result of an entirely separate incident, and it was for this work-related back injury that the Plaintiff was receiving workers' compensation benefits. The collateral source rule, as defined by Black's Law Dictionary, Fifth Edition, holds that if an injured person receives compensation for his injuries from a source solely independent of the tort feasor, the payment should not be deducted from the damages which he would otherwise

collect from the tort feasor. In other words, the Defendant tort feasor may not benefit from the fact that the Plaintiff has received money from other sources as a result of Defendant's tort, eg., sickness and health insurance.

Without going into specific details of each and every one of the cases cited by Plaintiff, each and every case cited by Plaintiff's Brief involves essentially the situation where an employee or former employee sues either his employer or third party, as a result of *that* injury sustained in that specific incident.

For instance, in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963), a former employee was suing New York Central Railroad. At the same time, while he was a Plaintiff suing New York Central Railroad, the plaintiff was also receiving disability payments from that defendant. As such, the collateral source rule prohibited evidence leading to the payment of these benefits. It must be stressed that this is not at all similar to the factual scenario in the instant case. The Plaintiff was not suing Blount Construction, his employer at the time of his injuries, for his back injuries. The Plaintiff was suing the Palm Beach County Sheriff's Office for injuries allegedly sustained to his right leg as a result of the actions of the Defendants.

In Plaintiff's cite to *Southern v. Plumb Tools, Div. of O'Ames Corp.*, 696 F. 2d 1321 (11th Cir. ALA 1983), (per curiam) the Plaintiff hurt his eye when metal flew off a hammer. As a result of the eye injury, and while he was receiving workers' compensation benefits for that eye injury, the injured worker sued the manufacturer of the hammer for the eye injury. As was the case with the *Eichel* case, this background is not at all analogous to the instant

lawsuit. Clearly, the *Southern* case is dealing with collateral benefits paid for the eye injury.

It is true that in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, rehearing denied, 375 U.S. 396 (1963), the Court held that evidence of benefits under The Longshore & Harbor Workers' Compensation Act are too prejudicial and thus excluded. In that case, however, an offshore drill worker sued his employer. At the time of the lawsuit, the employee was receiving workers' compensation benefits from the very same injury that he was suing for. The fundamental problem that Plaintiff continues to miss the issue that payments received by the Plaintiff for his back injury simply are not collateral to the Plaintiff's leg injury that he sued upon. No matter how many cases Plaintiff cites to, it simply will not make those payments collateral. It also cannot be stressed enough that it was attempted fraud upon the Court by Plaintiff's counsel in attempting to tell the ladies and gentlemen of the jury that his client was 100% disabled and suffered corresponding economic losses because of his leg injury that required the admittance of this evidence into the instant case.

Petitioner points out that argument by counsel that Plaintiff in the tort suit was receiving workers' compensation benefits is improper and prejudicial because it may adversely affect the jury's deliberations or violate the collateral source rule, and cites to *Doucet v. Gulf Oil Corp.*, 783 F. 2d 518, rehearing denied 788 F. 2d 250 (5th Cir.), cert. denied, 479 U.S. 883 (1986).

The problem with the Plaintiff's citation to this case is that the Plaintiff was injured while working on an offshore oil rig. There was an argument and a dispute as

to who was the employer of the Plaintiff, either the oil company or a labor services contractor.

The use of the Longshoreman & Harbor Workers Compensation Act evidence was used to explain the borrowed employee rule to the ladies and gentlemen of the jury. Thus, there is absolutely no relevancy whatsoever in the application of the *Doucet* case to the instant cause of action.

It cannot be stressed enough that workers' compensation evidence was introduced regarding the payments being made to Plaintiff as a result of this back injury. As the verdict form indicates (R. 149), as all the testimony pointed throughout the case, the sole issue at trial before the Trial Court was whether or not Defendants violated the civil rights of the Plaintiff by breaking his leg. Plaintiff was not receiving any disability and/or any workers' compensation benefits for this leg injury. As such, workers' compensation benefits paid for Plaintiff's back injury is not a collateral source.

The Plaintiff was trying to recover money damages for his leg injury. Whether or not evidence was introduced regarding payment to Plaintiff on the job back injury are not collateral sources, this issue is not addressed in any of the cases cited in Plaintiff's Petition.

In *Withrow v. Cornwell*, 845 F. Supp. 784 (D. Kan. 1994), the Plaintiff argued that the Court erred in admitting Social Security forms into evidence or by failing to remove references to Social Security before submitting forms to the jury. Plaintiff argued in that case that the Social Security forms were inadmissible evidence of collateral source benefits and that the prejudicial effect of the forms outweighed the probative value.

Approximately two weeks prior to the accident upon which the Plaintiff sued the Defendant, the Plaintiff applied for Social Security disability benefits, claiming that she was totally disabled. As the Court is well aware, the Plaintiff in the instant lawsuit was 100% disabled because of a previous work related injury. Plaintiff told his own economist, Dr. Bernard Pettingill, and his vocational rehabilitation specialist, Mr. Glenn Feinstein, of this erroneous information.

In the *Withrow* case, over Plaintiff's objections, the Court admitted the Social Security application into evidence. While it was admittedly prejudicial to the Plaintiff, the Social Security applications were extremely relevant to the credibility of the Plaintiff's claim that she was not totally disabled until the accident in question. The *Withrow* Court held that the Social Security forms were not evidence of collateral source benefits or properly admitted into evidence.

Even if this Court were inclined to assume arguendo that the payments being received by Plaintiff for his work-related back injury were a collateral source, evidence of collateral source information is admissible in certain situations. The Collateral Source Doctrine does not bar evidence offered to show that the identical payment claimed as loss was in fact paid. Such evidence can be admissible to rebut a claim that a Plaintiff is making as to damages sustained. *Morgan Guaranty Trust Co. v. Garrett Corp.*, 625 F. Supp. 752 (S.D. N.Y. 1986).

Again, assuming arguendo that the workers' compensation benefits are collateral source, which the Respondent disagrees with, the Eighth Circuit has allowed evidence of collateral benefits to impeach a Plaintiff who misleads the jury, which is exactly what

happened in the instant case. *Lang v. Missouri P. R. Co.*, 703 F. 2d 322 (8th Cir. Ark. 1983). The evidence concerning Plaintiff's receipt of workers' compensation benefits is clearly relevant to test the credibility of the Plaintiff's assertion regarding not only his lost wage claim, but also the true cause of his 100% disability. See also *Gladden v. P. Henderson & Co.*, 390 U.S. 1013, 20 L.Ed. 162, 88 S. Ct. 1262 (1968).

As such, there was no error in the introduction of the workers' compensation benefits paid to Plaintiff, there is no conflict with any other District, and as such, the Writ of Certiorari based upon these grounds must be denied.

III. Admission Of Plaintiff's Blood Content Is Not In Conflict With Any Other Districts.

The Petitioner contends that the Defendants introduced, without foundation, evidence of the Plaintiff's intoxication. Unfortunately, the Plaintiff's blood alcohol level was entered into evidence through the testimony of the emergency room physician, Dr. Peter Lamelas, without objection of the Plaintiff's counsel (Tr. 559-560).

The Respondent has no earthly idea why the cite of *Montana v. Egelhoff*, 135 L.Ed. 2d 361, 116 S. Ct. 2013 (1996) would have any relevancy whatsoever in the instant case. *Montana* involved criminal homicide, where the Defendant wanted to introduce evidence of intoxication as to the element of knowingly and purposely as it applies to a criminal homicide case.

The fact that Plaintiff had a .30 blood alcohol level was extremely critical to the instant case, particularly given the divergent stories as to how the Plaintiff's injury occurred to his leg. The Plaintiff's alcoholic condition was addressed by wholly independent witnesses, including

Mr. Santiago, who indicated "I smelled alcohol on him" (Tr. 491), and that Plaintiff's blood alcohol was 319.165 from Dr. Lamelas (Tr. 559).

First and foremost, the blood alcohol of the Plaintiff was introduced into evidence upon cross examination of Dr. Lamelas without objection, and appropriately so, after the District Court denied the Plaintiff's Motion in Limine as to the evidence of blood alcohol (Tr. 560-561). Interestingly, the Plaintiff's counsel himself was actively involved in obtaining from his client upon direct examination, the amount of alcohol that the Plaintiff had consumed. Plaintiff was asked by his own counsel "At what time during the day did you start drinking if you recall" and "During the course of the day, how much did you drink", to which the Plaintiff replied "I couldn't honestly tell you. We drank beer all day long. You know, Saturday afternoon" (Tr. 665).

Despite the fact that the blood alcohol level of the Plaintiff was extremely relevant as to the state of mind of the Plaintiff and his ability to recall the events of the night in question, the Plaintiff is of the position that the evidence should have been excluded as irrelevant under Federal Evidence 401 and prejudicial under Federal Rule of Evidence 403. Again, the Plaintiff had moved this Court in Limine for an Order prohibiting such evidence, which was properly denied.

The Court is afforded wide discretion in determining the admissibility of evidence under the Federal Rules of Evidence. *United States v. Abel*, 469 U.S. 45, 83 L.Ed. 2d 450, 105 S. Ct. 465 (1984). The alcohol level of the Plaintiff was highly probative of not only the state of mind of the Plaintiff in this case, but also as to his credibility. The Plaintiff's testimony during his deposition was that he

had only a glass of wine or two immediately before the incident took place at his residence (Tr. 820). When this case is looked at as a whole, it is essentially a case of the Plaintiff's word versus the Defendant's word. The fact that Plaintiff alleges to have had only a glass of wine or two does not comport to the Plaintiff's outlandish behavior, not only at the site of the arrest, but upon both visits to Humana Hospital. Clearly, the probative value far outweighs its prejudicial effect of this testimony.

Courts have allowed the evidence of intoxication in cases where the issues of whether the police had probable cause to arrest the Plaintiff, and whether an officer's use of force was justified under these circumstances. *Kladis v. Brezek*, 823 F. 2d 1014 (7th Cir. IN. 1987), *McKinney v. Galvin*, 701 F. 2d 584 (6th Cir. Mich. 1983). Petitioner cites numerous cases wherein motor vehicle accident cases allow, and sometimes disallow, blood alcohol content. This case does not concern the Plaintiff's operation of a motor vehicle. However, this case does deal with the state of mind and whether or not Plaintiff can actually recall the night in question. This is the heart of the case, and the intoxicated state of the Plaintiff was highly relative and properly admitted through the hospital records, as testified by Dr. Lamelas. The hospital records containing results of tests concerning the Plaintiff's blood alcohol level immediately after the accident are admissible under the hearsay exception for reports kept in the ordinary course of business. *Andres v. Gilberti*, 592 So. 2d 1250, (Fla. Dist.Ct.App. 4th Dist. 1992) see also *Love v. Garcia*, 611 So. 2d 1270, (Fla.Dist.Ct. App. 4th Dist. 1992).

In the case of *Eschelbach v. William S. Skull Co.*, 293 F. 2d 599 (3rd Cir. N.Y. 1961), the Court held that evidence produced on cross examination of the Plaintiff as to the

extent of his drinking alcoholic beverages during the relevant time period was properly admitted to test the credibility of the Plaintiff suing for personal injuries.

Further, in *Saladino v. Winkler*, 608 F. 2d 1211 (7th Cir. Ill. 1979), evidence as to the intoxication of the Plaintiff at the time of a police shooting was relevant to the issue of reasonableness of his conduct at such time, and the probative value of such evidence was not substantially outweighed by danger of unfair prejudice. The Court held that intoxication evidence tends to make more probable that the Plaintiff acted as the Defendant contended he did.

Plaintiff continues to erroneously rely on the case of *Miles v. Ryan*, 338 F. Supp. 1065 (E.D. PA. 1972), aff'd 484 F. 2d 1255 (3rd Cir. 1973) in his assertion that blood alcohol in the instant case should have been excluded. A complete reading of *Miles*, other than reading the head notes, reveals that the Trial Court disallowed evidence regarding alcohol ingested prior to a car accident, because there was no indication that the Plaintiff could have laid a foundation showing the actual state of intoxication. The *Miles* case is not at all applicable. Predicate was clearly laid in the instant case by the Humana Hospital records as to the Plaintiff's .30 blood alcohol level.

As such, because the Plaintiff's blood alcohol level is so critical to the testimony presented to the jury in this case, because its probative value significantly outweighed its prejudicial effect, and because the Trial Court is given wide latitude as to what evidence is admissible and not admissible, the Trial Court properly allowed blood alcohol content into evidence, and does not warrant review in the instant case.

IV. Eleventh Circuit's Decision Awarding Directed Verdict In Favor Of Defendant GRANT Is Not Contrary To The Court's Ruling In *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S. Ct. 1160 (1993) Nor Contrary To Other Decisions In Other Districts.

Respondent does not dispute that under the Supreme Court's holding in *Leatherman v. Tarrant County*, 113 S. Ct. 1160 (1993), that there is no heightened pleading requirements necessary for a 42 U.S.C. § 1983 claim.

The Amended Complaint of Plaintiff alleges that Defendant GRANT was acting in the color of State law (R. 93, paragraph 56), and that Defendant GRANT sanctions, ratified, authorized, or otherwise covered up the actions of his subordinate co-defendants, specifically, Defendants MATTINO and HIMMELSBACH, by failing to report their actions . . . (R. 93, paragraph 60).

Petitioner cites a whole litany of cases that are inapplicable to the instant case. All of the cases cited address a fact scenario where an officer who was present during the use of excessive force, or knew of the use of excessive force, did nothing to prevent or intervene in this use of force, and therefore was liable under 42 U.S.C. § 1983, were as liable as the actual officer who had partaken in the incident.

No testimony exists that Defendant GRANT had any physical contact whatsoever with Plaintiff subsequent to Plaintiff's departure from his trailer to the time he arrived at Humana Hospital on the second occasion. The only evidence against Defendant GRANT is that he said "what the hell is going on" (Tr. 690). There is absolutely no evidence that Defendant GRANT knew or even had information that Plaintiff's leg was even broken. There is

absolutely no evidence in the record that Defendant GRANT had at his disposal, to ascertain that Defendant HIMMELSBACH and Defendant MATTINO's version of the story was not correct. Even assuming arguendo that Defendant GRANT would have known that Plaintiff's leg was broken, there is absolutely no evidence in the record that he would have known that it was done intentionally. Plaintiff never told Defendant GRANT that Defendant HIMMELSBACH or Defendant MATTINO broke his leg. There is absolutely no evidence in the record that establishes any knowledge Defendant GRANT had on that evening as to Plaintiff's "side of the story". In fact, his very testimony as to "what the hell is going on here" means just that, he had no idea what was going on.

The Plaintiff cites to the case of *Santiago v. Fenton*, 891 F. 2d 373 (1st Cir. Mass. 1989) in his contention that Defendant GRANT can be held liable under 42 U.S. Code Section 1983 because of his role in partaking to conspire to violate the civil rights of the Plaintiff. In *Santiago*, the Court held that a civil rights conspiracy is a "combination of two or more persons acting on concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another in an overt act that results in damages."

To be actionable under Section 1983, the Plaintiff has to prove that "there has been, besides the agreement, an actual deprivation of rights secured by the Constitution and laws." *Earle v. Benoit*, 850 F. 2d 836, 844 (1st Cir. Mass. 1988).

Absolutely no evidence exists that Defendant GRANT met any of the requisite elements for a civil

rights conspiracy. As such, any attempt to analyze the instant case to the *Santiago* case is unfounded.

As such, because the Plaintiff failed to offer into evidence any facts as to liability should be assessed against Defendant GRANT the directed verdict in favor of Defendant GRANT was correct, and not contrary to the holdings in *Leatherman*, nor contrary to other decisions in other Circuits, and as such, review is not warranted.

CONCLUSION

No compelling reasons for review exists in this instant case. The Eleventh Circuit Court of Appeals' per curiam decision found no error and as such, the Writ of Certiorari should be denied.

Respectfully submitted,

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